



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Laser Power Technologies, Inc.

**File:** B-233369; B-233369.2

**Date:** March 13, 1989

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### DIGEST

1. Although an agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the competitive procurement system, even if no actual impropriety can be shown, a discussion of a procurement at an out of office meeting between the chairman of the technical evaluation team and a principal representative of an offeror shortly prior to the issuance of the solicitation is not sufficient reason to exclude that offeror from the competition in the absence of evidence that information was improperly disclosed at this meeting or evidence of possible bias or preferential treatment on the part of the evaluators.
2. As a general rule, offerors cannot receive an award under a request for proposals if they do not propose key personnel who meet minimum requirements. Nevertheless, where an agency ascertains during the course of a protest that the selected firm failed to address two of 23 required key personnel positions, but determines after reevaluating the offeror's proposal that the award selection is unaffected, the award will not be disturbed, notwithstanding this deficiency, where the agency reasonably determines that the omission of the particular two personnel is a relatively minor item in the overall evaluation, which otherwise clearly establishes the offeror's entitlement to award.
3. Letters of commitment from an offeror's proposed key personnel, in which they grant permission for their names to be used on a proposal and agree to negotiate in good faith should the offeror receive the award, can be accepted in satisfaction of a request for proposal's requirement for a firm commitment from key personnel, where "firm commitment" is undefined and the agency is reasonably assured the employees are committed to the offeror. Binding bilateral agreements between the offeror and the key personnel are not required.

C-44896/138208

4. A request for proposals, which includes a key personnel clause, does not require designated key personnel to be permanent, or even that the contractor commence performance with the personnel listed in the proposal, so long as the contractor provides personnel as qualified as those listed in the proposal and obtains agency approval for all substituted personnel.

5. There is no legal basis for favoring a firm with a presumption on the basis of past performance; an offeror is required to demonstrate its capabilities in its proposal.

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#### **DECISION**

Laser Power Technologies, Inc., protests the proposed award of a contract to S. Systems Corporation by the United States Air Force, Kirtland Air Force Base (AFB), New Mexico, under request for proposals (RFP) F29601-88-R-0015, to operate the Developmental Optics Facility (DOF).

We deny the protest.

#### **BACKGROUND**

The DOF is staffed with various scientists, engineers, and specialized technicians, and is currently being operated under a contract with Martin Marietta Corporation. The DOF supports the Air Force's high energy laser and advanced beam weapons programs by performing research, development and fabrication of various specialized optical components and coatings.

The RFP was issued on June 7, 1988, as a small disadvantaged business set-aside and contemplated the award of a cost-plus-award-fee contract. Prior to the RFP's issuance, a draft RFP was issued to potential sources for comments. A pre-proposal conference was held on June 13, 1988.

The RFP provides that award would be "made primarily on the basis of technical/management superiority" with cost being carefully considered, but the least important area. The technical/management area consisted of four items: (1) personnel qualifications; (2) soundness of technical approach; (3) soundness of management approach; and (4) special technical considerations, with the first three items being equally important and item 4 of lesser importance. Under the "personnel qualifications" item, offerors were required to supply resumes and letters of intent to accept employment for the designated key personnel positions.

Initial proposals were submitted by July 7, 1988. Laser Power proposed the use of and obtained written commitments from much of the incumbent staff. S. Systems, while stating that it would recruit from the incumbent staff if it was selected, proposed personnel not employed in the DOF.

After discussions and best and final offers, both offerors were rated "acceptable." As for "personnel qualifications," Laser Power's proposal had an "exceptional" rating as compared to S. Systems' "acceptable" rating. On the other hand, S. Systems was rated "exceptional" for the "soundness of technical approach" and "special technical considerations" items, while Laser Power received "acceptable" ratings for these items. Laser Power proposed the lowest cost plus fee of \$20,875,948, while S. Systems' cost plus fee was \$22,799,112.1/

On October 4, 1988,2/ the source selection official (SSO) selected S. Systems for award because: (1) its proposal showed a "superior, fully detailed technical approach"; (2) it had available, through its subcontractors, Lentec Corporation, R&D Associates, and Perkin-Elmer Corporation, "world class outside resources in terms of personnel and equipment"; and (3) it proposed "innovative ideas both to upgrade the performance of the DOF as well as to improve the state-of-the-art of high energy laser . . . optical components development." The SSO found these factors outweighed the potential cost savings of contracting with Laser Power, given that cost is the least important evaluation factor. The SSO observed with regard to the Laser Power proposal:

"Although [Laser Power] has hiring commitments from individuals currently involved in the DOF operation, they are using this as their principal experience and capabilities base. Their technical proposal only describes operational capabilities of the DOF whereas the RFP required detailed logical technical approaches which were never described. After deficiency questions, the

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1/ The Air Force determined both offerors' proposed costs were reasonable.

2/ Because of the protest, the Air Force has not yet made award. Laser Power contends that S. Systems is nevertheless performing the contract work; however, this has been specifically contradicted by the Air Force and S. Systems.

proposal only improved slightly which made [its rating for] 'Soundness of Technical Approach' acceptable at the low end of the range (minimal)."

Laser Power protests that there were a number of apparent conflicts of interest resulting from inappropriate contacts by officials of S. Systems and its subcontractor Lentec with Air Force and Martin Marietta personnel prior to and during the proposal evaluation period. Laser Power also contends that certain sensitive or proprietary data involving the performance of the incumbent's DOF contract was improperly divulged to S. Systems under another contract the latter has at Kirtland AFB and that a Lentec employee was improperly granted access to DOF. Laser Power also contends that the award selection was improper because S. Systems did not offer firm commitments from its key personnel as required by the RFP. Finally, Laser Power makes some contentions relating to the reasonableness of the evaluation of proposals and source selection.

#### ALLEGED CONFLICTS OF INTEREST

Laser Power identified three separate relationships between Air Force or Martin Marietta employees and S. Systems or Lentec or their officials, which Laser Power claims create an apparent conflict of interest such that S. Systems should be precluded from receiving the award.

#### Contacts Between Awardee's Representative and Chairman of Evaluation Team

The primary relationship which Laser Power states created an apparent conflict of interest was that between a vice president of Lentec, a primary subcontractor of S. Systems, and the chairman of the Air Force technical evaluation team (hereinafter Chairman) on this RFP. Laser Power alleges that the Lentec vice president is a recently retired Air Force Lieutenant Colonel, who actively participated in the preparation of S. Systems' proposal and who, up until his retirement in March 1988, was the direct supervisor of the Chairman as well as his long-standing and close friend. Laser Power contends that these individuals had frequent, perhaps daily, contacts "prior to the issuance of the RFP, during the preparation of proposals, after the submission of proposals, during and after the evaluation, and up to the time of" this protest. Laser Power contends that an actual or apparent conflict of interest exists since it appears the Lentec vice president had actual or apparent "use of inside information."

In support of these contentions, Laser Power submitted two affidavits of its officers who state that they were advised of this relationship and the improper contacts by a senior level civilian employee at Kirtland AFB who was previously responsible for the DOF (hereinafter senior employee). The Air Force and S. Systems submitted affidavits from the Lentec vice president and the Chairman, which disputed the Laser Power affidavits.

#### Other Alleged Conflicts of Interest

Laser Power also claims an apparent conflict of interest exists because of the relationship of the Lentec vice president and another Lentec official with the incumbent manager of the DOF, an employee of Martin Marietta. Laser Power has provided an affidavit of a Martin Marietta employee who states these individuals are close friends and that the incumbent DOF manager keeps Lentec and S. Systems officials "up to speed" concerning happenings at DOF.

The Air Force has provided a statement from the DOF manager, who assumed his position in June 1988,<sup>3/</sup> who states he knows the Lentec official on a professional, not a social basis. The DOF manager denies providing source selection sensitive or inside information to Lentec or S. Systems.

The third alleged conflict of interest situation involves the job seeking activities of a former Air Force lieutenant, who was involved in the early stages of drafting the RFP. Laser Power has produced a letter to it from the former lieutenant dated shortly before the RFP was issued, and speculates that she may also have been in contact with S. Systems or its subcontractors and divulged procurement sensitive information in those contacts.

The former lieutenant, who left the service in early 1988 and who is employed by a company not associated with this procurement, says she sent out 110 letters like that referenced by Laser Power to various companies seeking employment in early 1988. Both S. Systems and the former lieutenant deny discussing procurement sensitive information.

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<sup>3/</sup> The DOF manager states that the previous manager, who had served for 10 years, is an officer of Laser Power and may have been in a better position to furnish Laser Power with information than the current DOF manager.

## Findings of Fact

We held a fact-finding conference under section 21.5(b) of our Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1988), to determine the nature of the contacts between the Lentec vice president and the Chairman during the solicitation and evaluation of offers. The senior employee, the Lentec vice president, and the Chairman gave sworn testimony and were subject to cross examination at the fact-finding conference. The following findings of fact are based on the testimony and various affidavits that have been submitted to our Office.

The Lentec vice president was actively involved in preparing S. Systems' proposal and recruiting personnel for the proposal. Conference Transcript (Tr.) at 71, 77-80, 82-83, 88. He is a retired Air Force Lieutenant Colonel, who was assigned to Kirtland AFB until he retired effective March 1, 1988. Tr. 68-69. He had no involvement with this procurement prior to his retirement. Tr. 16-17, 67, 69. From May 1987 to March 1, 1988, he was the immediate supervisor of the Chairman, who was not responsible for DOF during that time. Tr. 12-13, 16-17, 24, 36, 68, 91, 94.

The Lentec vice president and the Chairman have known each other since 1984-1985. Tr. 69. They do not socialize on a continuing basis. Tr. 47, 70, 91. The Chairman and his wife had dinner at the Lentec vice president's house in Albuquerque, New Mexico, in early 1987 prior to the Chairman's transfer to Kirtland AFB in May 1987. Tr. 70, 91.

In early 1988, before the issuance of the RFP, the Chairman and his wife were invited by the Lentec vice president and his wife for a "late evening snack" in an Albuquerque restaurant, which was paid for by the Chairman.<sup>4/</sup> Tr. 91-92. This procurement was discussed at that meeting. Tr. 93.

Also, prior to the issuance of the RFP, the Lentec vice president and another Lentec official met with the Chairman in the Chairman's office to discuss several items of Lentec's concern about various RFP provisions; there is no indication the Chairman divulged sensitive data at this

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<sup>4/</sup> In view of Chairman's specific testimony, we are not persuaded by the Lentec vice president's earlier testimony that there were no instances (other than the early 1987 dinner) where he got together out of the Office with the Chairman and their wives. Tr. 70

meeting; rather, the meeting was to discuss Lentec's comments. Tr. 71, 82, 92-93.

Since the Lentec vice president had business not associated with this procurement, which entailed meeting with other Air Force employees, who were located near the Chairman's office, the Chairman and Lentec vice president had casual contacts in the hallway on at least two occasions during the period from the June 13 pre-proposal conference until the award selection on October 4; the procurement was not discussed during these contacts. Tr. 42, 46-47, 57, 72-75, 93, 96-98. Also, during this period, the Lentec vice president and the Chairman met casually at the Officers Club and, one time, shared a table for lunch with at least five other persons; no procurement information was discussed at the Officers Club. Tr. 74, 93.

The senior employee, who Laser Power's affiants state was the person who told them about the frequent contacts between the Lentec vice president and the Chairman, testified that his office was near the Chairman's office; that he saw the Lentec vice president in the building on numerous occasions; and that he saw the Lentec vice president talking with the Chairman on two or three occasions; however, he had no knowledge of any contacts after July 10, 1988, shortly after receipt of proposals, since he then moved to another building. Tr. 35-36, 47, 57.

#### Analysis

An agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKF Engineering, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; RCA Service Co., B-224366, Aug. 28, 1986, 86-2 CPD ¶ 241; NKF Engineering Co. v. United States, 805 F.2d 372 (Fed. Cir. 1986); CACI, Inc.--Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983). Our review is to determine whether the agency has a reasonable basis for its decision to allow an offeror to compete in the face of an allegation or indication of an apparent conflict of interest. NKF Engineering, Inc., 65 Comp. Gen. supra, at 107; RCA Service Co., B-224361, supra, at 3.

Based on our review, we do not find a conflict of interest that justifies precluding S. Systems from award. First, with regard to the job seeking lieutenant, there is not a scintilla of evidence that her contacts were inappropriate or that she discussed this procurement with any firm.

Similarly, there is no indication of impropriety or conflict of interest in the awardee's contacts with Martin Marietta's DOF manager.<sup>5/</sup>

With regard to the issue of the contacts between the Lentec vice president and the Chairman, we found that contrary to the Air Force's allegations, the Lentec vice president did not have "limited involvement" in the preparation of the proposal, but rather was actively involved in preparing S. Systems' proposal and recruiting personnel for the proposal. However, he was not involved in any way with the DOF procurement before he retired from the Air Force.

With the exception of the "late night snack" discussed below, the contacts between the Lentec vice president and Chairman were incidental. There is no evidence of any inappropriate contacts from the date of issuance of the RFP up until award selection. For example, the business meeting in the Chairman's office prior to the issuance of the RFP was in response to a draft RFP that was issued for comments to the limited number of small disadvantaged business sources. Consequently, the Chairman's meeting with a potential source who has comments to offer on the RFP is not unexpected in the circumstances, given the fact that no RFP had yet been issued and there was some question if sufficient sources existed. At this meeting, the Chairman was listening and responding to Lentec's comments and suggestions on revising the RFP; there is no indication he divulged procurement sensitive information.

Moreover, the other visits during this procurement process by the Lentec vice president to the same building as occupied by the Chairman did not concern this procurement, but were for Lentec's legitimate business purposes. Neither the Lentec vice president nor the Chairman were required to ignore each other when they met in the hall in that building or at the Officers Club, although any conversation they may have should have been discreet and not concern this procurement. There is no evidence that any inappropriate contacts occurred in this context.

On the other hand, the Chairman testified that the procurement was discussed at a "late evening snack" with the Lentec vice president and their wives just before the RFP was issued. Nevertheless, the Chairman expressly denies disclosing sensitive or inside information to Lentec or

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<sup>5/</sup> We are unaware of any legal requirements which limit or preclude any contacts with incumbent contractor employees.



S. Systems, and there is no evidence that refutes the Chairman's statement. We do not think the Chairman used sound judgment in discussing the procurement with a potential offeror in this context. However, we do not find this one possible indiscretion warrants excluding S. Systems from the competition, since there is no evidence that information was improperly disclosed at this meeting and since there is no evidence of possible bias or preferential treatment on the part of the evaluators in favor of S. Systems. See Mariah Assocs., Inc., B-231710, Oct. 17, 1988, 88-2 CPD ¶ 357.

#### ALLEGED PREFERENTIAL TREATMENT OF AWARDEE

Laser Power has identified three other incidents which it says show a pattern favoring S. Systems to the prejudice of Laser Power. First, Laser Power, which had proposed the use of much of the incumbent staff, refers to a meeting, held prior to the issuance of the RFP, between Air Force and Martin Marietta officials where one Air Force official stated that if one offeror obtained commitments for this RFP from most of the incumbent Martin Marietta employees, it would be assumed that there was collusion or possible anti-trust violations, which would "backfire" on that offeror.

The Air Force notes this meeting was with Martin Marietta officials to caution them to provide access by all potential offerors to the incumbent employees, since it was alleged by some potential sources that the Martin Marietta DOF manager at that time, who was soon to be employed by Laser Power, was using undue influence on incumbent employees by not allowing adequate access.

Whether or not the alleged statements referenced by Laser Power were entirely appropriate, it is clear that permitting free access to the incumbent employees was important to enhancing competition on this procurement. Moreover, the Air Force officials who allegedly made the statements did not participate in the evaluation of proposals and there is no evidence of any particular animus or prejudice toward any offeror as a result of its employing incumbent employees.<sup>6/</sup>

The second incident of allegedly preferential treatment involved a Lentec official, who entered the DOF in contravention of the Air Force instructions that no further access would be permitted, a prohibition which was

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<sup>6/</sup> To the contrary, Laser Power received the high rating in "personnel qualifications" in large part because of its proposed use of incumbent employees.

verbalized both at the pre-proposal conference and during the on-site visit. Laser Power claims that this employee recruited incumbent employees during these visits.

The record shows that this employee violated the Air Force instructions and did visit the DOF at least two times after the pre-proposal conference. Although the access by the Lentec official was improper, there is no indication that he recruited incumbent employees during these visits or that S. Systems obtained any competitive advantage as a result. Consequently, this failure to follow the Air Force's verbal instructions provides no basis to disturb the award selection.

Laser Power also contended that S. Systems obtained sensitive inside data concerning the incumbent DOF contract from the Air Force through another contract it has at Kirtland AFB. The Air Force and S. Systems denied this contention. Since the parties had submitted conflicting affidavits supporting their respective positions, we utilized the fact-finding conference to try to resolve this point. After that conference, Laser Power conceded that the data provided S. Systems under its other contract was not business confidential or proprietary. Consequently, we need not consider this matter further.

#### ADEQUACY OF AWARDEE'S KEY PERSONNEL COMMITMENTS

Laser Power contends that S. Systems did not commit its key personnel in its proposal as required by the RFP. In this regard, Laser Power contends that S. Systems had no intention of providing many of the personnel it proposed or that it proposed them simply as temporary fill-ins to receive evaluation credit until permanent hires were made. Laser Power also contends that the form of the letters of intent to accept employment executed by S. Systems' key personnel do not constitute the binding commitments required by the RFP.

The RFP proposal instructions and evaluation criteria required offerors to provide resumes for all key personnel. Sixteen key personnel classifications were listed in the proposal instructions. The proposal instructions also required offerors to supply with their proposals "a letter of intent to accept employment signed by the individual" for all key personnel "named in the proposal . . . not currently employed by the offeror." The evaluation criteria reiterated this last requirement and warned that:

"failure to include statements or data showing that the offeror has a firm commitment from key personnel . . . stating their availability in the event of contract award may result in an 'unacceptable' rating."

Finally, the RFP contained a "key personnel" clause, which says that these personnel "are considered to be essential to the work being performed." This clause required that prior to diverting key personnel to other programs, the contractor:

"notify the contracting officer reasonably in advance and . . . submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program."

No diversion is permitted without the contracting officer's written consent.

As indicated above, S. Systems' proposed key personnel were not incumbent employees. However, S. Systems stated that it was committed to hire most of the incumbent employees in the event it received the award. S. Systems identified 23 key personnel positions in its final proposal and submitted the resumes of 28 individuals to fill these positions.<sup>7/</sup> For many of the key personnel positions, S. Systems offered personnel of Lentec, R&D Associates and Perkin-Elmer, who were to fill the positions only until the incumbent or another qualified employee was hired.

In contrast to Laser Power's "exceptional" rating in personnel qualifications, the source evaluation team found S. Systems was "acceptable" for the personnel qualifications item, with the proposed personnel being generally highly qualified, except for the proposed coating laboratory

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<sup>7/</sup> Consistent with the RFP, more than one individual was needed for some of the 16 key personnel classifications (e.g., S. Systems proposed three full-time senior research opticians). Additionally, for some key personnel positions, S. Systems proposed several part-time individuals to share a single key personnel position.

supervisor who was perceived as having limited experience.<sup>8/</sup> The technical evaluation team specifically found that S. Systems' and its subcontractors' proposed personnel "had written commitments in their proposed positions. All key personnel submitted signed letters of intent as required."

In its report on the protest, the Air Force notes that in reviewing its files, it discovered for the first time that S. Systems' final proposal did not address two key personnel positions: quality assurance engineer and administration/budget analyst. The Air Force states that the technical evaluation team and SSO therefore reevaluated S. Systems' proposal, giving no credit for these two positions, and found that S. Systems' rating for "personnel qualifications" remained "acceptable," although slightly lower. The technical evaluation team and SSO state that this continuing "acceptable" rating for personnel qualifications was "based on the strength of the balance of the resumes." They noted:

"These two positions are of lesser importance than most of the key positions. We interpret the evaluation criteria as allowing us to find a proposal acceptable for a lack of a small number of resumes rather than mandating unacceptability,"

and found that:

"the overall technical rating of the offerors is unaffected. It still appears that S. Systems' proposal offers the government the best combination of price and technical factors."

Laser Power contends that S. Systems' failure to address these two key personnel positions in its proposal should have caused it to be rejected as unacceptable, and that the Air Force cannot waive this deficiency merely by reevaluating the proposals.

We have consistently recognized, however, that where an agency finds during the course of a protest that a proposal has been miscalculated, it has the discretion to reevaluate proposals, and may reasonably find that the ultimate award selection has not been affected; our Office's review of the

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<sup>8/</sup> Laser Power cites this individual's evaluated deficiency as evidence that S. System's proposal was overrated. However, since the technical evaluation noted the evaluated deficiency and apprised the SSO of it, this contention has no merit.

reevaluation is to determine whether the source selection decision is still reasonable. Spectra Technology, Inc.; Westinghouse Electric Corp., B-232565 et al., Jan. 10, 1989, 89-1 CPD ¶ \_\_\_\_\_; American Express Bank, Ltd., 67 Comp. Gen. 84 (1987), 87-2 CPD ¶ 488.

Here, Laser Power has not persuasively responded to the Air Force's determination that the two missing key personnel positions are of less relative importance than most of the 22 other key personnel positions, for which S. Systems proposed "strong personnel." For example, S. Systems did propose a quality assurance engineer/supervisor, who performs similar functions as the quality assurance engineer. Moreover, from our review of the job qualifications stated in the RFP, it appears that filling these positions will not be particularly difficult. For example, no particular qualifications for the administration/budget analyst position are stated; only "appropriate education and/or experience" is required. Furthermore, as pointed out by S. Systems and the Air Force, it is not entirely clear that the administration/budget analyst is a key personnel position, since it is not so designated in that portion of the proposal instructions which set forth the qualifications of the key personnel positions.

It is true that offerors cannot, and most times should not, receive award if they do not propose key personnel who comply with the RFP minimum requirements. See Consulting and Program Management, 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229; see also Corporate American Research Assocs., Inc., B-228579, Feb. 17, 1988, 88-1 CPD ¶ 160 (discussions were required to be reopened in order to allow an offeror to submit letters of commitment for key personnel positions). However, we believe that an award selection can be made, notwithstanding this deficiency, where, as here, the SSO reasonably finds that the offeror's failure to identify and commit some key personnel in accordance with the RFP requirements is a relatively minor item in the overall evaluation, and it is clearly established that the offeror has submitted the most advantageous proposal, such that the protester has not been prejudiced. See Development Associates, Inc., B-233221, Feb. 10, 1989, 89-1 CPD ¶ \_\_\_\_\_; Lee J. Kriegsfeld, B-222865, Aug. 22, 1986, 86-2 CPD ¶ 214. Consequently, S. Systems' failure to propose on the two key personnel positions does not preclude it from being selected for award.

"Letters of commitment" were submitted by S. Systems for key personnel not currently employed by S. Systems or its subcontractors.<sup>8/</sup> Laser Power claims that these commitment letters are not binding or firm as contemplated by the RFP. However, the agency must only be "reasonably assured" that the key employees are firmly committed to the offeror. Management Services, Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD ¶ 74 at 737; Development Alternatives, Inc., B-217010, Feb. 12, 1985, 85-1 CPD ¶ 188. Contrary to Laser Power's contentions, the RFP did not require a binding bilateral commitment or contractual agreement between offerors and their key personnel; the RFP only required the key personnel (not the offerors) to execute letters of employment intent firmly committing the employees to the offeror. See QED Systems, Inc., B-189410, Dec. 15, 1977, 77-2 CPD ¶ 467.

Laser Power further claims, however, that under S. Systems' letters of commitment, the key personnel are making no firm commitments to S. Systems, but only illusory ones. In this regard, the letters of commitment only give permission for a person's name to be used in the proposal for this RFP and that person's agreement to "negotiate in good faith for a position" with S. Systems (or Lentec) should it "be successful in its bid for the DOF contract."

It is true that S. Systems' letters of commitment seem less firm than they could have been. However, the S. Systems personnel did more than merely express interest in possible employment; they agreed to "negotiate in good faith" if S. Systems received the award. Compare Corporate American Research Assocs., Inc., B-228579, *supra*, where further letters of commitment were required by the agency to be reasonably assured that personnel, who had previously merely expressed interest in employment, were firmly committed to the offeror. Under the circumstances and since the RFP does not define what constitutes a "firm commitment," we find that S. Systems could reasonably offer and the Air Force could reasonably accept these letters as satisfying

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<sup>8/</sup> For the current S. Systems and Lentec employees proposed as key personnel, no letters of commitment were offered; however, we agree with S. Systems and the Air Force that the RFP proposal instructions do not require letters of commitment to be submitted for such employees. See RCA Service Co., B-219636, Nov. 4, 1985, 85-2 CPD ¶ 518 at 6. For the R&D Associates and Perkin-Elmer employees offered as key personnel, S. Systems' proposal contained letters of commitment from both subcontractors to provide these personnel.

RFP requirements. Harris/Ragan Management Corp., B-209823, Aug. 2, 1983, 83-2 CPD ¶ 154; I Systems, Inc., B-186513, Jan. 27, 1977, 77-1 CPD ¶ 65.

Laser Power also contends that S. Systems' proposal to employ unspecified incumbent key personnel and only employ its subcontractor key personnel for a short term until it hired permanent individuals for these positions is inconsistent with the RFP requirement for firmly committed key personnel.<sup>9/</sup> However, we find the Air Force's acceptance of this approach, which was not prohibited by the RFP, was neither unreasonable nor inconsistent with the evaluation criteria. In this regard, the Air Force reasonably found that many incumbent personnel would accept positions with S. Systems if it received the award and, meanwhile, other fully qualified personnel were committed to perform the RFP work. Moreover, S. Systems' "acceptable" personnel qualifications rating was significantly lower than the near perfect rating of Laser Power, which submitted the resumes of committed incumbent key personnel.

Laser Power also claims the alleged commitment of and to S. Systems' key personnel is belied by S. Systems' recent recruitment actions; that is, S. Systems advertised for a project manager of the DOF shortly after award selection and was seeking a scientific glassblower in December 1988. As explained by the Air Force, S. Systems was trying to locate the best qualified personnel for DOF key personnel positions and it would still provide the proposed individuals for these positions unless better qualified personnel were located.

Laser Power essentially contends the RFP requires that proposed key personnel must be for permanent positions. However, the RFP, which contains the "key personnel" clause referenced above, does not require designated key personnel to be permanent, nor even that the contractor commence performance with the personnel listed in its proposal, so long as the contractor provides personnel as qualified as those listed in the proposal and obtains the Air Force's approval for all substituted key personnel. A.B. Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶ \_\_\_\_\_. Indeed, there is nothing unusual or inherently improper for an awardee to

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<sup>9/</sup> Since S. Systems forthrightly stated this plan, it is clear that it was submitting the names of its key personnel in good faith, rather than employing some "bait and switch" game. See Informatics General Corp., B-224182, Feb. 2, 1987, 87-1 CPD ¶ 105.

recruit and hire personnel employed by the incumbent contractor. A.B. Dick Co., B-233142, supra, at 5; Applications Research Co., B-230097, May 25, 1988, 88-1 CPD ¶ 499.

#### REASONABLENESS OF EVALUATION

Laser Power has raised various contentions about the reasonableness of the proposal evaluations and source selection. First, Laser Power contends that since S. Systems is only planning to use R&D Associates and Perkin-Elmer to start up the job, the source selection was irrational in relying on those firms' expertise in justifying the award selection. However, S. Systems' proposal shows a greater involvement by those firms in the DOF than merely furnishing some of the initial personnel. For example, these subcontractors can provide significant "surge capability" with "world class" personnel and facilities in case assigned tasks exceed the DOF's capabilities. This substantially contributed to S. Systems' "exceptional" rating in the "special technical considerations" evaluation item.

Laser Power received an "acceptable" rating for the "soundness of technical approach" evaluation item. The Air Force reasonably found that Laser Power's less specific technical approach only described the DOF's operational capabilities while S. Systems' proposal (rated "exceptional" for this item) specifically identified how each task would be accomplished with innovative ideas that may improve the operation of the DOF.

Laser Power complains that the Air Force acted irrationally in downgrading its technical approach, since it proposed basically the same approach with the same personnel as utilized by Martin Marietta in its exemplary operation of the DOF. Laser Power explains that the RFP said that offerors' experience would be evaluated "as a general consideration" for all evaluation items and that the Air Force would consider information outside the proposal relating to an offeror's experience. However, it is well established that an offeror runs the risk of being rejected or downgraded if it does not submit an adequately written proposal. Intelcom Support Services, Inc., B-225600, May 7, 1987, 87-1 CPD ¶ 487. There is no legal basis for favoring a firm with presumptions on the basis of past performance; it must demonstrate capabilities in the proposal that were required by the RFP to be addressed. Id.

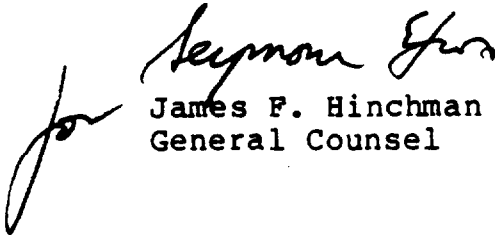


Laser Power speculates that S. Systems' cost may be understated because of its plan to hire incumbent employees and only employ R&D Associates and Perkin-Elmer employees for a short time. However, our in camera review of S. Systems' proposal does not indicate that its proposed salary costs are inconsistent with its technical/management proposal or materially understated.

Finally, Laser Power contends S. Systems' lack of experience in optics was not considered in the evaluation.

"Experience" was not a specific evaluation criterion under the RFP, but rather was said to be a general consideration for all evaluation areas. Both S. Systems and the Air Force have documented and detailed S. Systems' optics experience, and we find that the offerors' relative experience should not impact on the source selection decision. To the extent Laser Power contends that S. Systems is not sufficiently experienced to successfully perform this contract, this contention concerns S. Systems' responsibility; we will not review affirmative determinations of responsibility, absent conditions not present here. 4 C.F.R. § 21.3(m)(5).

The protest is denied.

  
James F. Hinchman  
General Counsel